

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DICK VELLEMA,

Appellant,

v.

NORTHWEST AIR POLLUTION
AUTHORITY,

Respondent.

PCHB No. 84-271

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of the imposition of a civil penalty in the sum of \$100 for burning prohibited materials in an outdoor fire, came on for informal hearing before the Pollution Control Hearings Board; Wick Dufford (presiding) and Gayle Rothrock, on December 17, 1984, in Bellingham, Washington.

Appellant appeared and represented himself. Respondent Northwest Air Pollution Authority (NWAPA) appeared by its attorney Ken Evans.

Witnesses were sworn and testified. Exhibits were admitted and examined. Oral argument was heard. From the testimony heard and

1 exhibits examined, the Board makes these

2 FINDINGS OF FACT

3 I

4 Appellant Vellema operates a business involving, among other
5 things, demolition and land clearing work. Respondent agency, NWAPA,
6 is a municipal corporation, authorized by law to carry out a program
7 of air pollution prevention and control, with jurisdiction in Whatcom
8 County, where the events at issue took place. NWAPA furnished to the
9 Board a certified copy of the pertinent sections of its effective
10 regulations.

11 II

12 On the morning of August 7, 1984, in response to a telephoned
13 complaint, NWAPA's inspector arrived at a lot on Bender Street in
14 Lynden, Washington, at about 9:30 a.m., and observed there the
15 smoldering remains of a fire. In the residue the inspector saw
16 several burnt cans which looked like they might have been paint cans.
17 She also noticed some lacquered wood, partially burned--the vestiges
18 of a piano. The day was overcast and gray, but it was not raining.
19 There was no black smoke; no offensive odor. It appeared that the
20 fire had been burning for some time.

21 III

22 The fire the inspector observed was conducted by the appellant and
23 his employees as a part of a clearing job for a new roadway. The job
24 involved getting rid of old structures, vegetation and debris which
25 included blackberry vines, tree stumps and branches, old fence posts,

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1 pallet boards, some stalls, a horse barn and a small cinder block
2 building with a cedar shingle roof. The building contained a few
3 pieces of furniture, a small amount of bedding, some work benches, and
4 an old piano. In the building also were tires, hoses, a barrel of
5 used oil, six cans of used oil, and a number of cans of a
6 water-proofing material. Outside was the shell of a pick-up truck
7 with no tires, no interior, no oil, no gasoline.

8 IV

9 The burning of material on the site took place in stages, with the
10 stalls, vegetation and pallets being burned first. The burning in
11 question involved flammables left from the cinder block building after
12 appellant had removed everything which he believed was prohibited
13 material for an open fire. The tires, the used oil, the hoses--all
14 were disposed of elsewhere. The piano was dismantled and all the
15 cherry wood on the exterior saved for reuse. The only part left was
16 the interior board with the strings attached. The building was
17 smashed and then whatever was left that would burn was burned. The
18 cans of water-proofing material were not removed.

19 V

20 The fire was begun on August 6, 1984, at about 11:00 a.m. under
21 appellant's supervision. By 2:30 p.m. it was burning low. It rained
22 intermittently on the blaze and it continued to smolder through the
23 night and into the next day. Appellant testified that the fire made a
24 whitish smoke, not a dense black cloud.

1 VI

2 There is no evidence of the composition of the water-proofing
3 material left in the fire. Appellant stated that he believed that it
4 was a chemical product, not petroleum based, and not so far as he
5 knew, flammable.

6 VII

7 A notice of violation was mailed to appellant on the afternoon of
8 August 7, 1984, asserting a violation of NWAPA Regulations, Section
9 501.22 for burning prohibited materials. A notice of civil penalty
10 was mailed to appellant on August 23, 1984, assessing a fine of \$100.
11 The penalty notice stated that the fine was being imposed because of a
12 violation of "SECTION 501 - OUTDOOR FIRE (Burning Prohibited
13 Materials)."

14 VIII

15 Appellant received the notice of civil penalty on August 24,
16 1984. His notice of appeal to this Board arrived in an envelope
17 postmarked September 19, 1984. The envelope was not stamped-in by the
18 Board until October 10, 1984. During this period a mix-up occurred
19 which delayed the pick-up of some of the Board's mail deposited in its
20 outside mail box. The testimony of appellant that he mailed the
21 notice on September 19 is corroborated by the postmark. Accordingly,
22 the Board believes that its receipt of the appeal occurred prior to
23 September 23, 1984.

24 IX

25 Any Conclusion of Law which is deemed a Finding of Fact is hereby

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1 adopted as such.

2 From these Findings of Fact the Board comes to these

3 CONCLUSIONS OF LAW

4 I

5 NWAPA's motion to dismiss this appeal as untimely is denied. The
6 Board has jurisdiction over these persons and these matters. RCW
7 43.21B.

8 II

9 The Legislature of the State of Washington has enacted the
10 following policy on outdoor fires:

11 It is the policy of the state to achieve and maintain
12 high levels of air quality and to this end to
13 minimize to the greatest extent reasonably possible
14 the burning of outdoor fires. Consistent with this
15 policy, the legislature declares that such fires
16 should be allowed only on a limited basis under
17 strict regulation and close control. RCW 70.94.740.

18 In elaboration of this policy the legislature described certain kinds
19 of outdoor burning that should be allowed under regulation. The focus
20 is on the burning of residues of natural vegetation. RCW 760.94.750,
21 755, 770. The legislature also provided a listing of the kinds of
22 burning which are prohibited outright. The relevant prohibitions are
23 as follows:

24 No person shall cause or allow any outdoor fire:
25 (1) Containing garbage, dead animals, asphalt,
26 petroleum products, paints, rubber products, plastics
27 or any other substances other than natural vegetation
which normally emits dense smoke or obnoxious odors...
(Emphasis added.) RCW 70.94.775.

III

NWAPA's implementation of the underlying statute is set forth in

1 Section 501 of its regulations. The prohibitions, as applicable here,
2 are stated as follows:

3 501.2 It shall be unlawful for any person to cause or
4 allow any outdoor fire: ...

5 501.22 Containing prohibited materials,
6 including, but not limited to, rubber products,
7 asphaltic products, tires, crankcase oil,
8 petroleum wastes, plastics, garbage, dead
9 animals or other like material. (Emphasis
10 added.)

11 501.23 That emits dense smoke or creates
12 offensive odors or creates a nuisance when
13 burned...

14 The specific listings in the regulation and in the statute are not
15 precisely the same, but do appear to cover the same ground in a
16 generic sense. The term "other like material" in Section 501.22 must
17 be interpreted in a way which is consistent with the statute and
18 therefore is limited to substances (other than natural vegetation)
19 which normally emit "dense smoke or obnoxious odors."

20 IV

21 The evidence does not disclose that the fire in question contained
22 any of the materials specifically prohibited by Section 501.22. The
23 agency did not prove that the water-proofing material left in the fire
24 was a product falling into a prohibited category. The agency did not
25 prove that the fire emitted dense smoke or obnoxious odors. The
26 burning of a single lacquered board from a demolished piano was not
27 shown to have this effect and such burning otherwise does not come
within the language of the specific prohibitions.

V

In the appeal of a civil penalty it is the burden of the agency to

1 prove that a violation in fact occurred. NWAPA did not carry that
2 burden in this case.

3 VI

4 It may be that greater precision in describing what is prohibited
5 in outdoor burning by NWAPA would be helpful to the public. For
6 example, painted boards, paints themselves, or petroleum products
7 other than wastes are not expressly listed among the prohibited
8 items. If the agency wants to eliminate them from open fires, it
9 would make sense to say so directly. In the instant case the alleged
10 violator thought he had removed all prohibited materials before the
11 burn. NWAPA did not show that he failed. But this case points up
12 that the regulations as presently written are unclear as to exactly
13 what materials can legitimately be left in a burn pile.

14 VII

15 Because the civil penalty was assessed solely for violating
16 Section 501.22, no consideration was given to whether appellant might
17 have violated some other provisions of the regulations, such as those
18 concerned with requirements for getting permits from NWAPA.

19 VIII

20 Any Finding of Fact which is deemed a Conclusion of Law is hereby
21 adopted as such.

22 From these Conclusions of Law the Board enters this
23
24
25

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ORDER

NWAPA's Notice of Imposition of Civil Penalty directed to Vellema Construction and dated August 23, 1984, is reversed and the civil penalty of \$100 is vacated.

DONE this 12th day of March, 1985, at Lacey, Washington.

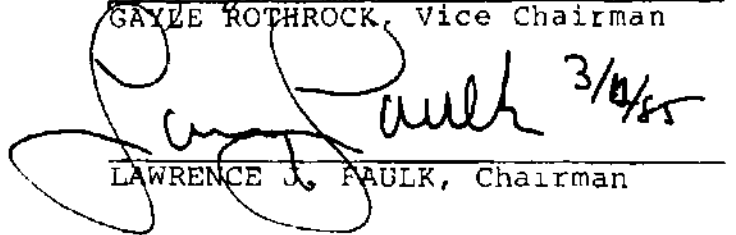
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